Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 97-208
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in South Carolina	)	

MCI Exhibit F:
California CPUC Decision,
MCI v. Pacific Bell (Sept. 24, 1997)

ALJ/GEW/rmn

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SEP 25 1997 SEP 26 1997

MH, EL, KSR

Decision 97-09-113 September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MCI Telecommunications Corporation, Complainant, vs. Pacific Bell, Defendant.	Case 96-12-026 (Filed December 11, 1996)
AT&T Communications of California, Inc., Complainant, vs. Pacific Bell, Defendant.	Case 96-12-044 (Filed December 23, 1996)
New Telco, LP , d/b/a Sprint Telecommunications Venture (U 5552 C) and Sprint Communications Company, L.P. (U 5112 C), Complainants, vs. Pacific Bell (U 1001 C), Defendant.	Case 97-02-021 (Filed February 20, 1997)

(See Attachment A for list of appearances.)

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OPINION

1. Summary

This decision dismisses three complaints against Pacific Bell filed by local exchange competitors, finding after hearing that while Pacific Bell is not providing resale local exchange service equivalent to its own service to retail customers, no violation of state or federal law, order, or rule has been shown. This order also directs establishment of a separate investigation to monitor and encou ge the development of access to operations support systems.

2. Introduction

MCI Telecommunications Corporation (MCI) on December 11, 1996, filed a complaint against Pacific Bell and Pacific Bell Communications, pursuant to Public Utilities (PU) Code § 1702 alleging that a "pattern of illegal conduct" by Pacific Bell had thwarted MCI's efforts to enter the local exchange market.

AT&T Communications of California, Inc. (AT&T) on December 23, 1996, filed its complaint against Pacific Bell, alleging that Pacific Bell had instituted internal processes that prevented AT&T from competing effectively in the local exchange market.

Sprint Telecommunications Venture and Sprint Communications Company L.P. (collectively, Sprint) filed a complaint against Pacific Bell on February 20, 1997, alleging that Pacific Bell had failed to process Sprint's customer orders promptly and accurately when customers sought to change their local exchange service from Pacific Bell to Sprint.

In its answers to these complaints, Pacific Bell denied any violation of law, rule or Commission order, but it admitted that its interim processes for handling orders "are not foolproof and...delays have occurred."[1] It alleged that much of the delay was

[1] Pacific Bell's Answer to MCI's Complaint, at 4.

caused by MCI and others when they continued to send paper orders instead of using electronic data transfer.

Pacific Bell moved to dismiss each of the complaints on grounds that the exclusive remedy for the disputes raised in the complaints is arbitration, pursuant to the terms of interconnection agreements between Pacific Bell and each of the complainants. Alternatively, Pacific Bell moved to dismiss claims that challenge schedules contained in the interconnection agreements.

3. Procedural History

A prehearing conference was conducted on February 21, 1997, and the following matters were resolved:

* Assigned Commissioner Jessie J. Knight, Jr., directed parties to convene a workshop on March 4, 1997, to seek to resolve technical issues raised by the complaints.

* The motion of Pacific Bell Communications, the intended long distance affiliate of Pacific Bell, to be dismissed from the complaint filed by MCI was granted on grounds that the complaint did not allege wrongful acts by the affiliate. MCI did not oppose the motion.

* Unopposed petitions to intervene were granted on behalf of Brooks Fiber Communications, Inc.; Genesis Communications International, Inc.; Working Assets Funding Service, Inc., and the California Association of Competitive Telecommunications Companies. The Commission's Consumer Services Division was made a party to the proceeding on the basis of its notice of participation, but the Division later announced that it would not participate in the hearing. On May 12, 1997, LCI International Telecom Corporation was granted intervenor status.

* The MCI and AT&T complaints were consolidated, pursuant to Rule 55 of the Rules of Practice and Procedure, because the cases involved related questions of law and fact. By Administrative Law Judge's Ruling dated March 31, 1997, Sprint's unopposed motion that its complaint be consolidated with those of MCI and AT&T was granted.

* A discovery cutoff date and dates for the exchange of written testimony were established, and evidentiary hearings were scheduled to begin the week of May 12, 1997, in San Francisco.

Evidentiary hearings were conducted over four days (May 12-15, 1997). The Commission heard testimony from four witnesses for MCI, two from AT&T, one from Sprint, and two from Pacific Bell. Twenty-seven exhibits were received into evidence. Concurrent briefs were received on May 30, 1997, with reply briefs received on June 9, 1997.

4. Issues Resolved or Withdrawn

On March 7, 1997, MCI and AT&T reported that, as a result of the workshop with Pacific Bell and other carriers, two issues had been resolved:

* MCI alleged that Pacific Bell had refused, without written customer authorization, to disclose to other carriers certain information about business customers that MCI states that it needs in order to submit an order to change those customers' local exchange service to MCI. Pacific Bell relied for this practice on PU Code § 2891 (Customer Right to Privacy). MCI reported that Pacific Bell has changed its policy with respect to business customers. Accordingly, this count of MCI's complaint is no longer at issue and is dismissed.

* AT&T and MCI reported that "all parties agreed that the issue of a permanent industry solution and schedule for implementation of electronic interfaces providing direct real time access to Pacific Bell's operations and support systems is not an issue in this proceeding." The parties acknowledged that this matter is the subject of ongoing consideration in the Open Access and Network Architecture Development (OANAD) proceeding, Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044.

At the direction of the administrative law judge, MCI reviewed its complaint and, on May 15, 1997, withdrew a number of claims based on the passage of time and changed facts and circumstances.[2] Claims withdrawn are:

* A claim that Pacific Bell had not begun negotiations with MCI regarding automated on-line service ordering. (Complaint, ¶ 36.)

* A claim that Pacific Bell had provided AT&T with an electronic data interface but had not provided such an interface for MCI. (Complaint, ¶ 40.)

* A claim that Pacific Bell had provided inferior operating support systems to MCI. (Complaint, ¶ 41; Complaint, ¶ 54.)

* A claim that Pacific Bell had failed to provide access to its customer database to MCI while providing such access to an MCI competitor. (Complaint, ¶ 55.)

* A claim that Pacific Bell had refused to negotiate the terms of an on-line service ordering system. (Complaint, ¶ 56.)

5. Complainants' Evidence

MCI presented four witnesses and numerous exhibits, showing, among other things, that from the time MCI first began to submit local service resale orders to Pacific Bell in September 1996, Pacific Bell's backlog in processing these orders was between 4,000 and 5,000 orders and remained at about 5,000 as of May 2, 1997. (The parties appear to agree that an order is backlogged if it is not completed within three business days of submission.) Loren D. Pfau, an MCI senior manager, testified that between January and mid-April 1997, the average time from Pacific Bell's receipt of an MCI resale order to MCI's receipt of a notice of completion of the order has run between 14 and 19 days. By contrast, MCI witnesses said that Pacific Bell customers seeking to add a line or change a number are able to do so within a day.

[2] Letter dated May 15, 1997, addressed to Administrative Law Judge Walker, and signed by counsel for MCI. The letter is contained in the formal file of Case 96-12-026.

Judith R. Levine, executive director of brand marketing for the MCI division serving consumer and small business accounts, testified that MCI's local service marketing in California has been frustrated by delays that customers encountered when MCI placed their orders with Pacific Bell. Levine blamed poor management by Pacific Bell in planning and implementing its processes for local exchange competition, and she said this created a bottleneck that restricts the number of orders that competitors can place. As a result, MCI ceased direct marketing of its local service resale products early this year because it "did not want to continue to frustrate and anger consumers by selling an unsatisfactory product." (Exhibit 2, at 3.)

Levine testified that Pacific Bell had reduced the staff of its local interconnection service center (LISC or Service Center) to approximately 100 persons late in 1996, and had failed to automate its processing, relying instead on manual entry of orders. Other MCI witnesses testified that, apart from the backlog problem, the mistakes inherent in manual processing of orders had led to loss of dial tone, loss of 411 directory listings and loss of other service features for MCI customers.

On cross-examination, MCI witnesses acknowledged that MCI had sent only manual orders to the Pacific Bell Service Center until February 1997, when it began electronic transmission; that a significant number of MCI resale orders are complex business orders, which cannot now be automated; and that MCI initially had encountered its own startup problems, including erroneous and duplicated orders. Asked if there was a reason to believe that Pacific Bell was causing delays and errors to occur in order to create problems for MCI and other competitors, an MCI witness replied: "No, I do not have any evidence that they were doing this intentionally." (Transcript, at 110.)

Mary Ann Collier, director of AT&T's local infrastructure and access management organization, testified that the backlog of AT&T orders at the Pacific Bell Service Center had risen to a high of 4,508 on February 21, 1997. Like MCI, she said, AT&T cut back its marketing of resale local exchange service because of the inability of Pacific Bell to process orders in a timely fashion. Even though AT&T had an automatic feed to Pacific Bell, known as the network data mover (NDM), Pacific Bell was receiving

the orders and then manually retyping them into its system. Collier testified that the Service Center had a capacity of about 400 orders a day at the beginning of 1997. She said that she received a letter from Pacific Bell on January 15, 1997, estimating that capacity would increase to 2,000 by the end of January 1997, while at the same time Pacific Bell had written to the Federal Communications Commission (FCC) estimating a capacity of 4,000 orders a day by the end of January 1997. In fact, she said, Pacific Bell had not reached a 2,000-order capacity at the time of hearing (May 12, 1997) and estimated that it would not do so until the end of June 1997. Asked if she had reached conclusions as to why Pacific Bell had encountered problems and delays, Collier stated:

> "One possible explanation is that Pacific is intentionally attempting to limit its loss of local market share, at least until it or its affiliate has entered the long distance market. While I don't entirely discount this possibility, I am unwilling to make such a claim at this time.
>
> "However, I do believe that for whatever reason, Pacific's management completely underestimated the complexity of providing resold local service to [competitive local carriers]..Pacific reacted very slowly and with limited resources. Indeed, Pacific has yet to demonstrate that it will devote the necessary resources (i.e., trained personnel, effective processes, and workable systems) to fix the problems and meet the demand...." (Exhibit 10, at 20.)

On cross-examination, Collier stated that even if Pacific Bell is able to process 4,000 orders per day, that would be insufficient to meet AT&T's needs, much less the needs of all competitive local carriers. She admitted, however, that AT&T had its own system problems that delayed its transmission of data to Pacific Bell until December 1996. That, in turn, caused AT&T to reduce the forecasts of expected resale volume that it was sending to Pacific Bell.

Stephen Huels, business planning director for local service in AT&T's Pacific Region, testified that consumer and business customers ordering local service through AT&T are facing delays three to four times longer than those of Pacific's retail customers. He said that Pacific Bell frequently changes a requested service installation due date without notifying AT&T, and AT&T thus is unable to notify the customer. He said that because of the high level of backlogged orders, AT&T suspended outbound telemarketing programs on March 26, 1997. Throughout January and February 1997, he

said, "AT&T had been significantly reducing its marketing efforts below planned levels because of the continually growing order backlog." (Exhibit 14, at 5.) In response to questions by the administrative law judge, Huels stated:

> "[Pacific Bell is] forecasting very limited numbers or volumes that they'll be able to handle over the course of the year. I think they're saying ... to this Commission and to the firms trying to utilize their processes to enter this market that we are going to design processes and ... systems that deliver this amount of capacity. And if you don't like it, tough." (Transcript, at 156.)

Sprint's witness, Paul A. Wescott, director of local market development, testified that Sprint entered the local exchange market on December 2, 1996, and immediately encountered problems with backlogged orders and errors in manual data entry. The delays, he said, result from a lack of appropriate business procedures, automation and adequate staffing of the Pacific Bell Service Center. Because of this, he testified that Sprint is precluded from entering the local exchange market through the resale of Pacific Bell services "for the foreseeable future." (Exhibit 15, at 30.)

6. Pacific Bell's Evidence

Pacific Bell presented its defense through the testimony of two witnesses, Jerald R. Sinn, a customer service vice president who headed the Service Center through 1996, and John T. Stankey, vice president for resale operations, who took over direction of the Service Center on January 16, 1997.

Sinn testified that Pacific Bell began plans to establish its Local Interconnection Service Center in 1995. In March 1996, the company forecast the number of orders it expected to receive from local exchange competitors and began staffing accordingly. In the summer of 1996, the Service Center had more than 100 service order writers available, but few orders were received. Because of the lack of work, some staff members were temporarily assigned to other work. Then, in September 1996, Sinn testified, the Service Center "was hit all of the sudden" with more than a thousand paper orders from MCI. He stated:

> "We found out quickly , by around mid-October, that our productivity estimates for our LISC staff were overestimated....(W)e simply underestimated the amount of time that it would take an order writer to process a migration order through

> the system. You can do all the testing you want, but the theoretical world does not always translate one-for-one into the real world." (Exhibit 16, at 3.)

Sinn said that systems that would automate some of the orders did not roll out on time. Additionally, he said, MCI's resale orders contained "a significant number" of errors and duplications that tied up Service Center staff. He testified that the problems experienced with MCI's orders not only undercut productivity in processing those orders but also took away resources that could have been dedicated to the orders of other carriers. Sinn testified that local exchange orders are a new line of business for Pacific Bell and a shakedown period was inevitable, and he said that it took AT&T eight months to solve its own internal processes before AT&T could begin local exchange marketing in earnest.

On cross-examination, Sinn acknowledged that Pacific Bell converted AT&T's electronic orders to paper so that they could be processed like the paper orders and facsimile-transmitted orders it was receiving from MCI, Sprint, and others. He said that this was done so that Pacific Bell would have a common process for handling orders from numerous carriers on a first-in, first-out basis. He testified that the number of employees in the Service Center had dropped to about 100 in the October 1996 and had been increased to 200 by January 1997. He said that Service Center employees were handling six to eight orders per day, about half of what Pacific Bell had anticipated. He testified that he could not explain how he came to forecast that the Service Center would be able to handle 2,000 orders per day by the end of January 1997 while another Pacific Bell executive was telling the FCC that the Service Center would reach 4,000 orders per day by that time.

Stankey testified that Pacific Bell is doing everything it can to increase the productivity of the Service Center. Permanent employees in the center have grown from 300 on March 1, 1997, and to more than 500 in May. Stankey said that the Service Center intends to have nearly 1,000 employees at work by the end of 1997. The company is adding 250,000 additional square feet of space for the Service Center, and management staff has doubled. Stankey testified that Pacific Bell has released system specifications to further automate handling of orders for basic exchange service, and it

CLC." (Transcript, at 464.) He testified that it would be August or September 1997 "before we'll be approaching a parity situation." (Transcript, at 489.) Asked by the administrative law judge if Pacific Bell would not be well served by appearing to increase change order capacity while actually slowing the process, Stankey answered:

> "That's not how I feel about the performance objectives being laid out for me. I don't think [that there has been] any discussion I had with anybody relative to the performance objectives ... that would suggest [that]." (Transcript, at 575.)

Stankey testified that the Service Center should be able to process 2,000-2,500 orders per day by the end of June; 4,000-4,500 orders per day by the end of September; and 6,000 per day by the end of the year. If competitors are permitted direct access to the SORD ordering provisioning system, he estimated that the number of orders that Pacific Bell could process by the end of year could climb to as many as 12,000 per day, since most consumer change orders would then be fully automated.

7. Discussion

7.1 Motions to Dismiss

We turn first to Pacific Bell's motions to dismiss the MCI, AT&T, and Sprint complaints.

Pacific Bell has entered into interconnection agreements with each of the complainants.[4] Each of the interconnection agreements establishes requirements for interconnection between the parties' networks and unbundling of network elements, along with detailed rules governing telecommunications services to be provided by one party to the other. The agreements contain a set of comprehensive terms and conditions under which Pacific Bell is required to provide unbundled elements and services for resale (including resale of local exchange services). The interconnection agreements are

[4] The MCI interconnection agreement was approved by the Commission in D.97-01-039, dated January 23, 1997. The AT&T interconnection agreement was approved by the Commission in D.96-12-034, dated December 9, 1996. The Sprint interconnection agreement was approved by the Commission in D.97-01-046, dated January 23, 1997.

each several hundred pages in length and were filed pursuant to Section 252 of the federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq.

In its motions to dismiss, Pacific Bell states that the interconnection agreements each provide that the exclusive remedy for any disputes relating to the agreement shall be arbitration. (See MCI interconnection agreement, ¶16.) According to Pacific Bell, each of the complaints alleges that Pacific Bell is not migrating local exchange customers to the other telephone carriers in a timely and accurate manner. In its motion to dismiss directed at the Sprint complaint, Pacific Bell states:

> "The standards for performance in migrating customers successfully to Sprint without outages, delays or errors are clearly the subject of the Interconnection Agreement. ([Sprint] Interconnection Agreement, Attachment 17, Service Performance Measures and Liquidated Remedies.) Because Sprint's claims relate to the subject of the Interconnection Agreement, the exclusive remedy for Sprint is arbitration. Accordingly, Sprint's complaint should be dismissed." (Pacific Bell Motion to Dismiss Sprint Complaint, at 2.)

In a joint response to the motions to dismiss, MCI and AT&T argue that their complaints allege unlawful, discriminatory and anti-competitive conduct by Pacific Bell in violation of the law and of Commission orders. MCI and AT&T state that the Commission is obligated to consider such complaints pursuant to Public Utilities Code § 1702. They state that the FCC addressed a similar issue in its First Interconnection Order (FCC 96-325), which discussed the FCC's complaint jurisdiction under Section 208 of the Communications Act and arbitration under Section 252 of the Telecommunications Act of 1996. The FCC concluded:

> "An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement.... We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act." (FCC 96-325, ¶¶ 127-128 (footnotes omitted).)

Even if the parties were deemed to have agreed that specific allegations within the complaints would be subject to the exclusive arbitration remedy, MCI and AT&T state, most of the complaint allegations predate the interconnection agreements. MCI states that it identifies wrongful conduct of Pacific Bell commencing in September 1996, long before the February 3, 1997, effective date of its interconnection agreement. AT&T alleges wrongful acts in November 1996, which is prior to the December 19, 1996, effective date of the AT&T interconnection agreement. Sprint makes similar arguments, adding:

> "Sprint's complaint arises from Pacific's violation of Commission decisions and orders, the Public Utilities Code and the Telecommunications Act of 1996, and invokes the Commission's obligation to act in the public interest to ensure that local exchange competition is implemented in a fair, non-discriminatory manner. Furthermore, the parties cannot, by contract, deprive the Commission of its continuing jurisdiction and statutory obligation to examine the practices of regulated utilities to ensure that they are consistent with the public interest." (Opposition of Sprint to the Motion to Dismiss, at 2.)

7.1.1 Discussion

We will deny the motions to dismiss these complaints.

In deciding motions to dismiss, the Commission determines "whether there are any triable issues as to any material fact." (Westcom Long Distance, Inc. v. Pacific Bell, et al. (1994) 54 CPUC2d 244.) Thus, the Commission has treated motions to dismiss as analogous to motions for summary judgment, reasoning that such motions "promote and protect the administration of justice and expedite litigation by the elimination of needless trials." (Westcom Long Distance, supra, citing Exchequer Acceptance Corp. v. Alexander (1969) 276 Cal.App.2d 1, 11.)

As the moving party, Pacific Bell has the burden of showing that the Commission cannot or should not consider these complaints in light of the parties' agreements to arbitrate performance disputes under the interconnection agreements.

We agree with Pacific Bell that much of MCI's complaint would seem to fall within the specific standards and rem.. .ies contemplated by the interconnection agreement.[5]

The gravamen of the complaints, however, is that Pacific Bell violated state and federal law and orders of this Commission by willfully or negligently failing to provide the means for prompt and efficient resale of local exchange service. The complaining parties allege that Pacific Bell's unlawful actions took place prior to the effective dates of the interconnection agreements. Pacific Bell has not shown that these claims present no issue of triable fact, nor has it made a persuasive showing that complainants should be estopped from pursuing such claims pursuant to PU Code § 1702. A motion to dismiss before hearing is a drastic remedy, and all doubts must be resolved against the moving party. (Joslin v. Marin Municipal Water Dist. (1967) 67 C.2d 132.) Accordingly, complainants are entitled to their day in the Commission courtroom to seek to prove the wrongdoing that they allege.

7.2 Merits of the Complaints

We turn now to the complaints and to the laws, rules and orders that are alleged to have been violated by Pacific Bell.

7.2.1 Failure to Achieve Parity

Pacific Bell admits that it has not achieved parity in providing local exchange resale service to competitors. It also admits that for the next several months it does not expect to be able to handle all of the local exchange resale orders that others seek to submit either within agreed-upon time li 'ts or with the speed and accuracy with which Pacific Bell handles orders for its own retail customers. Even if Pacific Bell permits competitors to have direct access to the SORD order provisioning system (which could double the number of resale orders that the Service Center could process),

[5] MCI on May 15, 1997, withdrew a number of claims it had raised in its complaint based on what it termed the passage of time and changed facts and circumstances. Several of these claims, including, for example, the timing for provision of an electronic data interface, appear to be governed by the MCI interconnection agreement. (MCI interconnection agreement, § 5.1.)

training the personnel of other carriers to use the system would take 4 to 14 weeks per person.

The admission that Pacific Bell has not now and is not likely soon to achieve parity in providing local exchange resale service to competitors has obvious implications in other proceedings before the Commission. When Pacific Bell seeks to enter long distance service through its affiliate, Pacific Bell Communications, Pacific Bell is required by Sections 251 and 271 of the Telecommunications Act to show that it has provided interconnection to its network "at least equal in quality to that provided by the local exchange carriers to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." (47 U.S.C. § 251(c)(2)(C).) The FCC, before it can authorize long distance service, must consult with this Commission on Pacific Bell's compliance with competitive checklist requirements, including the requirement that interconnection services be at parity with Pacific Bell's own services. (47 U.S.C. § 271(d)(2)(B).) Based on Pacific Bell's own admissions, the Commission would be compelled to report that, as of this date, Pacific Bell has not achieved parity in providing resale local exchange service.

However, the fact that Pacific Bell is not at parity is not dispositive of these complaints. The complaints are brought under PU Code § 1702 and Rule 9 of the Rules of Practice and Procedure. Accordingly, complainants have the burden of showing, by a preponderance of evidence, that an

> "...act or thing done or omitted to be done by [Pacific Bell], including any rule or charge heretofore established or fixed by or for [Pacific Bell], [is] in violation...of any provision of law or of any order or rule of the [C]ommission." (PU Code § 1702(a).)

While the complaints here are lengthy, complainants at hearing focused on five allegations. These are:

(1) Pacific Bell has unreasonably delayed the processing of orders changing local exchange service to a competing telephone company.

(2) Once switched, local exchange customers of competitors incur loss of dial tone more frequently than Pacific Bell customers.

(3) Local exchange customers of competitors incur loss of features (e.g., call waiting, call forwarding) more frequently than Pacific Bell customers.

(4) Local exchange customers incur dropped listings from the 411 information directory more frequently than Pacific Bell retail customers.

(5) Pacific Bell wrongfully refused to give certain customer information to competitors.

Complainants do not contend that loss of dial tone, loss of features and dropped 411 listings were deliberate efforts of sabotage by Pacific Bell. Instead, they raise these contentions as further examples (along with the backlog of change orders) of the lack of parity in service that competitor customers receive as opposed to the service that Pacific Bell retail customers receive. Accordingly, we will consider these loss-of-service allegations as part of our analysis of the issue of failure to achieve parity.

7.2.2 Public Utilities Code §§ 453, 709

Complainants assert that Pacific Bell's failure by the end of 1996 or by early 1997 to achieve parity in local exchange resale violates the no-preference requirement of PU Code § 453 and the fair competition requirement of PU Code § 709.[6] As relevant to these complaints, these statutes provide:

> "453. (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

> "709. The Legislature hereby finds and declares that the policies for telecommunications in California are as follows:

[6] MCI also alleges violation of PU Code § 761, and MCI and AT&T allege violation of PU Code § 702. Section 761 requires the Commission to fix standards of performance when it finds after hearing that practices of a public utility are unjust or inadequate. Section 702 requires a public utility to comply with orders of the Commission and to do everything necessary or proper to secure such compliance.

(d) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct.

(e) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."

Sprint contends that the delays and errors in Pacific Bell's resale order processes prejudice all competitive local carriers and subject them to a disadvantage compared to the level of service that Pacific Bell provides to itself and to its own retail customers. MCI contends that Pacific Bell's capacity for handling local exchange resale orders is so constrained as to virtually eliminate resale competition, and it argues that the evidence shows that Pacific Bell has not managed its resale operation with the skill of a reasonable expert manager, citing Re Southern California Edison (1994) 53 CPUC2d 452. AT&T contends that Pacific Bell is treating itself in a preferential manner through "totally inadequate" service to local exchange competitors.

No witness, however, claims that Pacific Bell has willfully degraded its service to local exchange competitors; no party has offered evidence to show that Pacific Bell could have done more to solve the technological problems of opening its systems to competitors, and no party has shown that PU Code §§ 453 and 709 carry implied timelines that have been violated by Pacific Bell's negligence or unreasonable behavior. While competitors' suspicions are rife, there simply is no substantial evidence on this record that the delays encountered in the Pacific Bell Service Center are more than what Pacific Bell claims they are – startup problems inevitable for this transition from monopoly to competitive service.

Pacific Bell notes correctly that this Commission, in approving the liquidated damages provisions of the AT&T interconnection agreement on December 9, 1996, recognized that a reasonable ramp-up period was bound to occur. The Commission in that proceeding adopted Pacific Bell's proposed six-month grace period for imposition of penalties, commenting:

> "(1) errors and omissions are bound to occur during the course of performance of any major contract, especially when it is a new line of business....; (2) it is reasonable to have a 6-month shakedown period in light of the fact that [AT&T's]

> level of business initially will be low and the time required [by Pacific Bell] to put systems in place; and (3) it is reasonable to provide for the parties to re-open performance standards after some operational experience." (Decision (D.) 96-12-034, at 14-15.)

The evidence shows that AT&T itself took eight months (until December 1996) to establish its own automated system for processing orders. MCI elected to use paper orders until it switched to a more automated electronic process in February 1997. Sprint began placing its orders in December 1996 and it also used facsimile transmission or overnight delivery of paper orders. No one disputes that Pacific Bell was genuinely surprised at the large number of paper orders it began to receive in September 1996, after the trickle of orders received during the summer, and no one suggests that Pacific Bell immediately could have increased the productivity of its order writers.

The evidence shows that loss of dial tone occurs because Pacific Bell processes a disconnect order and a new connect order separately, and a temporary disconnection can occur when the disconnect order is processed first. Complainants appear to agree that Pacific Bell has taken steps, although belatedly, to solve this problem with an electronic link between the two orders.

The loss of calling features was attributed to errors on the order forms made both by competitors and by Pacific Bell that will be alleviated as automation progresses. Dropped 411 listings also appears to be caused by human error, and the evidence suggests that additional training of Pacific Bell employees has alleviated the problem. Clearly, all of these problems further demonstrate the lack of parity between competitors and Pacific Bell in providing local exchange service.

In their briefs, complainants state that Pacific Bell has been on notice since July 1995 that it would be required to resell local exchange service effective March 1, 1996. (D.95-07-054, at 31.) In February 1996, Pacific Bell was ordered to put into place an automated on-line service ordering system for use by competitive carriers. (D.96-02-072, at 32.) Complainants appear to argue on brief that Pacific Bell has had ample shakedown time to bring its Service Center to parity, and Pacific Bell's failure to

do so must then represent conscious or negligent disregard of these Commission directives.

The evidence presented at hearing, however, shows that Pacific Bell received few resale orders until September 1996, and the systems and workforce it had in place could not be tested under real world conditions until that time. The ongoing Local Exchange and OANAD proceedings are testimony to the fact that the Commission and parties are still struggling with technical questions on how to achieve competitive interconnection. The Commission has previously ruled that a shakedown period extending through June 1997 is reasonable for AT&T connectivity.

PU Code § 453 does not fix a specific date for Pacific Bell to achieve parity in its resale of local exchange service. Fundamental rules of statutory construction require that the law be given a reasonable and common sense interpretation consistent with the apparent purpose. (DeYoung v. San Diego (1983) 147 C.A.3d 11.) Discrimination forbidden by Section 453 "must be undue, taking into consideration all of the surrounding facts and circumstances."[7] Complainants do not claim that Pacific Bell's delay in achieving parity is intentional, and they have failed to present evidence showing that the delay was unreasonable in light of all the facts and circumstances of the transition to local exchange resale service.

Similarly, complainants have not shown a violation of PU Code § 709, which states the intent and policy of the Legislature to encourage competition in the telecommunications industry. Based on the plain language of the statute, PU Code § 709 does not, standing alone, establish timetables for compliance, nor does it create a cause of action by one party against another. In essence, it mirrors the intent of the federal Telecommunications Act, which assumes that Bell companies' interest in entering the long distance market will motivate the Bell companies promptly to open their local calling markets to competition.

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[7] In re Atchison, Topeka and Santa Fe Railway Company (1940) 43 CRC 25, at 34.

There is no question that the Pacific Bell Service Center could have been better managed to have hastened the day that parity in local exchange service can be achieved, but the level of mismanagement shown on this record does not rise to the level of a violation actionable under PU Code § 1702.

7.2.3 Commission Orders

AT&T states that the evidence shows that Pacific Bell has violated the Local Competition Rules adopted by this Commission in D.95-07-054. Specifically, AT&T contends that the evidence shows that Pacific Bell's past and continuing practices violate Rule 1.D. of the rules. Rule 1.D. states:

> "It is the policy of the Commission that all telecommunications providers shall be subject to appropriate regulation designed to safeguard against anti-competitive conduct." (D.95-07-054, Appendix A, paragraph 1.D., at 1.)

AT&T also asserts that Pacific Bell's resale practices violate D.96-02-072, which AT&T cites for the proposition that local exchange carriers like Pacific Bell are required to:

> "...put into place an automated on-line service ordering and implementation scheduling system for use by CLCs." (D.96-02-072, Appendix E, Rule 8.C.)

AT&T states that Pacific Bell has violated D.95-07-054 by continuing to limit the capacity of its Service Center and by failing to meet its commitments for order confirmation. AT&T states that Pacific Bell violated D.96-02-072 by continuing to rely on manual intervention when accepting orders, and by not introducing fully automated on-line service ordering and provisioning.

Sprint and MCI make essentially the same arguments, as do intervenors LCI International Telecom Corp., Brooks Fiber Communications, and ICG Telecom Group, Inc.

We are not persuaded that complainants have stated a violation of Rule 1.D. of the 1995 Local Competition Rules, since the rule obviously is intended to be a policy statement. Even assuming that the rule can be interpreted to forbid anti-competitive conduct by Pacific Bell, it is difficult to discern what anti-competitive conduct is alleged, other than the failure to achieve parity. As we have discussed, the

failure to achieve parity, without more, is insufficient to state a cause of action under PU Code § 1702.

Similarly, no violation of law, order or rule is stated as to the 1996 directive requiring Pacific Bell to establish an automated ordering system unless complainants can show that specific timelines have not been met or that Pacific Bell has deliberately or through its negligence or inaction violated the rule. Indeed, as the ordering paragraphs of D.96-02-072 make clear, the Commission intended the parties through workshops to mutually agree on the automated systems that would be developed and, as it later developed, to enter into interconnection agreements setting performance timelines. (See, D.96-02-072, Ordering Paragraph 25.)

7.2.4 Telecommunications Act

The complaining parties direct us to Sections 271 and 251(c)(4)(B) of the Telecommunications Act of 1996, along with numerous FCC requirements promulgated under that Act, including 47 CFR §§ 51.311, 51.313, and 51.603. These provisions require that an incumbent local exchange carrier like Pacific Bell must offer just, reasonable and non-discriminatory access to unbundled network elements to competing carriers, and that, generally, such access "shall be at least equal in quality to that which the incumbent [local exchange carrier] provides to itself." (47 CFR § 51.311(b).)

We take official notice that the parties to these complaint cases are seeking to implement these and the Commission's requirements in workshops and hearings that are part of the on-going Local Competition proceeding and the Open Access and Network Architecture Development proceeding.[8] No one disputes the need

[8] The Local Competition proceeding is R. 95-04-043/I. 95-04-044; the OANAD proceeding is R.93-04-003/I.93-04-002. The workshops conducted regarding operations supports systems (OSS) jointly in the Local Competition and OANAD dockets during April and May of 1997 were specifically limited to addressing future systems and standards for OSS and excluded consideration of complaints regarding current problems. (See Workshop Notice for April 29 - May 2, 1997.) These complaint cases were referenced as the appropriate forum.

for these proceedings, nor is there any question that these proceedings deal with complex technological questions for converting Pacific Bell monopoly services to Pacific Bell competitive services. The instant complaints may have been premature, as a result of complainants' impatience to get competition started. In the absence of regulatory standards or industry-developed technical metrics for some of these new systems, it is difficult to find any particular violation. It has been the task of the OSS workshops in the Local Competition/OANAD dockets to develop these new systems and standards. As noted below, we are opening a new investigation to monitor progress towards local competition. This may be the appropriate forum to bring any further concerns.

The fact that Pacific Bell has not achieved parity in providing competitive services under the federal rules does not constitute a violation of those rules, or of PU Code § 1702, without a further showing that Pacific Bell either willfully or unreasonably is disregarding those mandates, or that Pacific Bell was technologically capable of providing parity services and failed to do so. None of those showings has been made in this proceeding.

7.2.5 Customer Information

MCI and AT&T allege that Pacific Bell's refusal to reveal certain information contained on Pacific Bell customer records is a violation of Section 222(c) of the Telecommunications Act.[9] Pacific Bell argues that it refused to disclose information about voice mail and inside wire maintenance because these are competitive services proprietary to it. Earlier in this proceeding, Pacific Bell announced that it will no longer refuse to disclose the identity of a customer's long distance carrier, and we deem that issue moot.

We take official notice that the proprietary nature of voice mail and inside wiring is dealt with in the Local Competition proceeding. We believe that the

[9] Section 222(c) states in part: "A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer."

Local Competition forum, with its more complete record, is the appropriate one for dealing with this aspect of the complaints.

8. Conclusion

MCI, AT&T, and Sprint have shown that Pacific Bell has failed to achieve parity in opening its local exchange service to competition. However, complaining parties have not shown that the failure to achieve parity constitutes a violation of law, or of an order or rule of this Commission. Accordingly, the complaints of MCI, AT&T, and Sprint are dismissed.

9. Policy Implications

This is a complaint case. As such, we are called upon to look solely at the record, and to hold complainants to their burden of proving that a specific law, order or rule of the Commission has been violated. (PU Code § 1702.)

Normally, in a complaint case, our obligation would go no further than this. In view of the broader implications of this case, however, we would be remiss as a Commission if we did not express our disappointment in the pace of local exchange competition that has been demonstrated here.

Commissioner Knight, the assigned commissioner, cautioned the parties at hearing that the Commission cannot tolerate continued delay in bringing the benefits of competition to California ratepayers. We agree. Commissioner Knight points out that the six-month "ramp up" period we anticipated in the AT&T interconnection agreement has now passed. Pacific Bell (and other telecommunications companies) should be held to performance commitments made to this Commission and to other parties.

At Commissioner Knight's suggestion, our order today directs the Telecommunications Division to immediately prepare an Order Instituting Investigation (OII) into how the Commission can create a regulatory mechanism that will allow the Commission both to monitor improvements in operations support systems (OSS) performance and to provide appropriate incentives for rapid improvements. While the instant complaint case is against Pacific Bell, the

Commission's mandate to open all local markets to competition encompasses GTE California Incorporated (GTEC), as well as Pacific Bell, so the OII should address GTEC s progress in implementing OSS in its territory. In this OII, the Telecommunications Division should concentrate on the development of ongoing performance reporting requirements, including performance metrics for retail and competitive service offerings and milestones for OSS improvements. When reasonable and technically attainable performance measures and milestone dates are established, it is our intention to levy fines and other sanctions for failure to meet our adopted performance requirements.

10. Comments on Proposed Decision

The proposed decision of the administrative law judge in this matter was mailed to the parties in accordance with PU Code §§ 311(d) and 311(f) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed by MCI, AT&T, Sprint, ICG Telecom Group, Cox California Telcom, Inc.,[10] Pacific Bell, and The Utility Reform Network (TURN).[11] Reply comments were filed by MCI, AT&T, Sprint, ICG Telecom Group, Pacific Bell, the California Cable Television Association, and Working Assets Funding Service.

With the exception of Pacific Bell, all of the commentators criticized the proposed decision for appearing to require that complainants prove willful or intentional violation of a statute. MCI, AT&T, and Sprint argue that the Commission's focus must be solely on the reasonableness of Pacific Bell's performance, and not on Pacific Bell's intent. AT&T states that "the relevant inquiry is whether Pacific's actual performance in fact violated the law." (Comments of AT&T, p. 3.) TURN states that its

[10] Cox California Telcom entered an appearance as an interested party, but did not intervene.
[11] TURN on August 13, 1997, filed a motion for leave to intervene "for the purpose of addressing the appropriateness of adopting an intent standard in complaint cases." The motion to intervene and file comments is unopposed. The motion is granted.